Filed 10/18/04 Mandell v. Regents of UC CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

CAROL P. MANDELL, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	C043889 (Super. Ct. No. CV001094)

Plaintiff Carol P. Mandell appeals from a judgment of dismissal following an order granting the motion for summary judgment of defendant The Regents of the University of California (the Regents). Plaintiff contends issues of fact exist on her claims of age and gender discrimination stemming from the Regents' decision to offer a faculty position to a younger, male applicant rather than her. We agree as to

plaintiff's age discrimination claim only and reverse the judgment.

FACTS AND PROCEDURAL HISTORY

Before discussing the facts of this matter, we address a deficiency in plaintiff's briefing. Instead of providing record citations to the evidence supporting the facts asserted in her opening brief, plaintiff cites particular entries in the Regents' statement of undisputed facts and her responding statement of additional disputed and undisputed facts. In addition, she does not indicate where these separate statements can be found in the record. And while the statements of undisputed fact refer to particular evidence supporting those facts, plaintiff has left it to this court to comb through the record to find that evidence.

It is plaintiff's obligation to provide record citations to the evidence supporting her assertions. Failure to do so may result in those assertions being disregarded. (See *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112-113.) Statements of undisputed fact, even if properly cited in the record, are not evidence. (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024.)

We decline to do plaintiff's job for her. Therefore, we shall disregard any assertions of fact in her opening brief that are not supported by proper record citations. However, in her reply brief, plaintiff has provided record citations for at

least some of the evidence she contends supports her contentions on appeal. We shall consider this evidence.

This dispute involves a staffing decision in the Department of Pathology, Microbiology, and Immunology (PMI), one of six academic departments in the School of Veterinary Medicine (the Veterinary School) at the University of California, Davis (the University). PMI was established in 1993 and, from its inception, there had been a faculty shortage in the pathology group. In 1997, plaintiff was hired for one year as a part-time lecturer to temporarily fill this faculty void. She was reappointed in 1998 and 1999.

In 1998, PMI received approval to search for a permanent clinical pathologist at the assistant professor level. As a general matter, the University has advocated hiring at the assistant professor level because this tends to draw a larger pool of female applicants. The job announcement for the position listed the requirements as follows: "Veterinarian with advanced training in Clinical Pathology. Board certification or eligibility in the American College of Veterinary Pathologists is required. Ph.D. preferred. Clinical experience and competence in Clinical Pathology. Demonstrated aptitude/experience in teaching. Documented research record or potential to develop an independent research program utilizing contemporary molecular techniques for the characterization of animal diseases. Must possess excellent interpersonal and communications skills and a demonstrated ability to work with others in a collegial team atmosphere." The clinical

pathologist position was to include a 40 percent clinical component, requiring the faculty member to direct, instruct, and supervise residents and professional students and to provide diagnostic services to patients. It also required teaching and research.

At the time of approval to search for a new faculty member, all PMI professors were tenured and a number were approaching an age at which they might consider retiring. N. James MacLachlan, the chair of PMI, considered it "desirable to recruit someone at the junior level, meaning a new clinical pathologist at the assistant professor [level] in order to ensure a smooth transition of teaching at the University."

This desire to recruit at the junior level was consistent with a 1999 strategic plan developed for PMI, which read: "The department has suffered very significant reductions in faculty numbers since its creation. . . . The reality is that fewer faculty now provide the core professional didactic and clinical instructional/service functions in both anatomic and clinical pathology . . . . [T]he departmental faculty are becoming increasingly senior (no untenured faculty currently; most are Full Professors), which can only be expected to create future problems and a potentially unhealthy academic environment." Elsewhere in the strategic plan, it was noted that "[t]he 'core' department is in somewhat of an unhealthy situation with a progressively aging faculty (fully 16 of the 19 faculty are full professors, and none are untenured)."

A search committee was selected that consisted of faculty members from the various disciplines within PMI. They were Dr. Patricia Conrad, Dr. Mary Christopher, Dr. Joseph Zinkl, Dr. Peter Moore and Dr. Richard Nelson. Dr. Conrad was chosen as the chair of the committee. The search committee was to serve in an advisory role in identifying a pool of qualified candidates for the PMI faculty to consider.

After reviewing resumes, applications and letters of reference, the committee selected four women, Drs. Holly Jordan, Janice Andrews, Tracy Stokol and plaintiff, and one man, Dr. Bill Vernau, to be interviewed for the faculty position.

Dr. Holly Jordan received her Doctor of Veterinary Medicine degree in 1988 and her Ph.D. in 1996, both from North Carolina State University. She received certification from the American College of Veterinary Pathologists in 1997. Since 1998, Dr. Jordan had been working as a research assistant professor in the Department of Medicine at the University of North Carolina at Chapel Hill.

Dr. Janice Andrews received her Doctor of Veterinary Medicine degree in 1987 from the University of Missouri and her Ph.D. in 1996 from The Ohio State University. She received certification from the American College of Veterinary Pathologists in 1997. Since 1996, Dr. Andrews had been working as a research assistant professor in the Department of Veterinary Microbiology, Pathology, and Parasitology in the Department of Veterinary Medicine at North Carolina State University.

Dr. Bill Vernau received a Bachelor of Veterinary Medicine and Surgery degree in 1984 from Murdoch University in Australia and a Doctor of Veterinary Sciences degree in clinical pathology in 1991 from Ontario Veterinary College at the University of Guelph in Canada. He received certification in clinical pathology from the American College of Veterinary Pathologists the same year. Since 1994, Dr. Vernau had been working as a part-time clinical pathologist for IDEXX Veterinary Services, a private diagnostic laboratory, in West Sacramento, California. Since 1997, he had been working on a Ph.D. in comparative pathology at the University.

Plaintiff received her veterinary degree from the University of Georgia in 1981. From 1985 to 1988, she served her residency in the clinical pathology department of the Veterinary Medical Teaching Hospital (VMTH) at the University. From 1988 to 1994, plaintiff worked as an adjunct instructor in the Department of Clinical Pathology in the Veterinary School, from which she received her Ph.D. in comparative pathology in 1994.

The candidates were asked by the committee to perform two seminars, one emphasizing research and the other emphasizing clinical matters, and were given multiple one-on-one interviews with the search committee and other faculty members.

Dr. Moore, who was the only person on the search committee with training and experience in clinical pathology, was also the "major professor" for Dr. Bill Vernau. Dr. Moore gave Dr. Vernau advice on how to present his previous work experience and

current research in the interview process. He also provided Dr. Vernau with some materials to use and advice on how to separate the content for his two seminars. After the seminars were completed, Dr. Vernau was permitted to give an additional seminar for Dr. Conrad, because Dr. Conrad had been unable to attend his scheduled seminar and interviews.

After the interview process was completed, the committee decided to eliminate Dr. Stokol and plaintiff from further consideration. Dr. Stokol was considered not to be as strong in research as the other candidates and plaintiff was considered not to be as strong in the clinical area. Members of the search committee "indicated concern about [plaintiff's] stated plans to develop a new research program, lack of publication productivity given a 100% research appointment, and her clinical and research seminars, especially her poor response to questions after her seminars."

After further review of the remaining three candidates, the search committee chose Dr. Vernau. According to Dr. Conrad, "Dr. Vernau was considered the most qualified candidate for the position because of his strong clinical experience, his research, his enthusiasm for his work and his interpersonal skills." The matter was then put to a vote of the PMI faculty, who voted overwhelmingly to approve the selection. The dean of the Veterinary School and the dean of the University then approved the selection.

Dr. Vernau was 39 years old at the time of his selection. He completed his Ph.D. at the University in January 2001 and

began working on the PMI faculty in April 2001. At the time of the faculty appointment, plaintiff was 47 years old. The last individual hired by PMI prior to Dr. Vernau was Dr. Linda Munson, who was 48 years old at the time and was hired over a younger, male applicant. In recent history, PMI has hired more women than men.

Plaintiff filed this action against the Regents on June 30, 2000, alleging age, gender and national origin discrimination under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). On the national origin claim, plaintiff alleged that Dr. Vernau was from Australia and that Dr. Moore, a member of the search committee, and Dr. Pascoe, the executive associate dean of the Veterinary School, were also from Australia.

The Regents moved for summary judgment or summary adjudication of issues. Plaintiff opposed the motion and objected to some of the evidence presented by the Regents. The trial court granted the motion for summary judgment, concluding plaintiff failed to demonstrate that the reasons proffered by the Regents for its hiring decision were not worthy of credence. Plaintiff moved for reconsideration, arguing, among other things, that the court erred in permitting the Regents to file supplemental declarations with their reply brief. Plaintiff requested specific rulings on its evidentiary objections. The court denied the motion for reconsideration, explaining that plaintiff had ample opportunity at oral argument to respond to the supplemental declarations and the court was not required to

rule on the evidentiary objections "because motions for summary judgment are reviewed *de novo*." Judgment was thereafter entered for the Regents.

DISCUSSION

I

Standard of Review

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

On appeal from an order granting summary judgment, we apply the same standard applicable to the trial court, i.e., we independently review the evidence in the record to determine if there are triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) Like the trial court, we view the evidence in the light most favorable to the

losing party and accept all inferences reasonably drawn therefrom. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

II

Evidentiary Matters

Plaintiff contends the trial court erred in allowing the Regents to submit additional evidence with their reply brief. The Regents submitted declarations by Dr. MacLachlan, Donna Roggenkamp, and Dr. Zinkl to address matters brought out in plaintiff's opposition. Plaintiff argues it is a violation of the summary judgment statute and due process to allow a party moving for summary judgment to submit additional evidence with a reply brief.

Code of Civil Procedure section 437c, subdivision (c), says that, "[I]n determining whether the papers show that there is no triable issue as to any material fact the court *shall* consider all of the evidence set forth in the papers . . . ." (Italics added.) In *Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 111, the Court of Appeal concluded the foregoing language *mandates* that the trial court consider all evidence presented, including that submitted with a reply brief. In *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308 (*San Diego Watercrafts*), a different panel of the same court repudiated *Kulesa* and concluded that consideration of evidence not set forth by the moving party in its separate statement is a matter of trial court discretion. (*Id.* at pp. 315-316.)

In *San Diego Watercrafts*, the court explained the rationale for considering only evidence set forth in a separate statement or the responses to that separate statement: "A construction permitting the court to disregard evidence not referenced in the moving party's separate statement recognizes the most efficient manner for trial judges to use these statements of undisputed facts in ruling on motions for summary judgment. When the moving party's statement is laid side by side with the opposing party's responsive separate statement, the court is directed to the specific evidence supporting any facts alleged to be disputed. Using this process, the court need only review evidence pertaining to disputed facts; there is no need for it to review evidence supporting facts which are agreed to be undisputed nor evidence not referenced in the moving party's separate statement or in the opposing party's responsive statement, at least insofar as the opposing party relies on facts which are claimed to be disputed." (*San Diego Watercrafts, supra,* 102 Cal.App.4th at p. 314.)

The foregoing rationale disappears where, as here, the opposing party includes in its response to the moving party's separate statement not only a response "to each of the material facts contended by the moving party to be undisputed" (Code Civ. Proc., § 437c, subd. (b)(3)), but also additional facts of its own that it claims are undisputed. The *San Diego Watercrafts* court expressly declined to consider whether the trial court is required to consider evidence submitted in a reply brief where the opposing party has submitted its own facts that it claims

are undisputed. (*San Diego Watercrafts, supra,* 102 Cal.App.4th at pp. 314-315.)

Plaintiff contends due process requires that the new evidence be rejected, because summary judgment is such a drastic remedy and plaintiff was denied an opportunity to respond to the evidence in the reply. In our view, when in response to the moving party's separate statement an opposing party presents additional facts that the opposing party claims are undisputed, due process is better served by allowing the moving party to reply to evidence presented in support of those facts than by disallowing such reply. Otherwise, the opponents would have an unfair advantage in being able to offer evidence in response to the moving party's factual assertions while a comparable right would be denied to the moving party. Furthermore, in this instance, plaintiff was given an opportunity to respond to the new evidence presented by the Regents. Plaintiff submitted a supplemental declaration addressing the matters raised by the Regents' evidence.

At any rate, plaintiff fails to explain how she was prejudiced by consideration of the new evidence. Article VI, section 13 of the California Constitution reads: "No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." A miscarriage of justice will be found "'only when the court "after an examination of the entire cause,

including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Cahill* (1993) 5 Cal.4th 478, 492; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Plaintiff next contends the trial court erred in impliedly overruling her objections to various evidence presented by the Regents. Where, as here, the trial court states it considered only admissible evidence, "we must take this statement as an implied overruling of any objection not specifically sustained." (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736.)

Failure to obtain a ruling on evidentiary objections normally results in a waiver of those objections. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.) Plaintiff contends there is an exception to this rule where the trial court expressly declined to rule on evidentiary objections despite being asked to do so. (See *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 624, fn. 7, disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 236.)

Assuming plaintiff adequately preserved the issue for appeal, she nevertheless failed to present any argument as to how the trial court erred in impliedly overruling her objections. Instead, plaintiff refers this court to the written objections she submitted to the trial court. However, incorporating trial briefs by reference in an appellate brief is

an improper mode of appellate advocacy, warranting a determination that the argument has been abandoned. (See *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721.) An appellant must argue her case to this court, not merely recycle her trial arguments. At any rate, as with her other evidentiary argument, plaintiff fails to explain how she was prejudiced by any implied overruling of her evidentiary objections.

III

Age Discrimination

Plaintiff contends there is sufficient evidence of age discrimination to withstand summary judgment.

Both federal and state law prohibit employers from discriminating against employees or potential employees on the basis of age. (Gov. Code, § 12941, subd. (a); 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.) "Although the state and federal antidiscrimination legislation 'differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute.'" (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662.)

In most discrimination cases, the plaintiff lacks direct evidence of discriminatory intent, a necessary element of his or her claim, and therefore must rely on circumstantial evidence. (*Clark v. Claremont University Center, supra,* 6 Cal.App.4th at

p. 662.) A three-part analysis was developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805 [36 L.Ed.2d 668, 677-679] for analyzing circumstantial evidence of intent: "(1) The complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive." (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317.)

In the context of this case, the elements of a prima facie case of age discrimination require proof that (1) the plaintiff was a member of a protected class, i.e., that she was between the ages of 40 and 65; (2) she was denied the faculty position; (3) she was qualified for the position; and (4) the position was given to another who is substantially younger. (Accord, *Gagne v. Northwest National Insurance Co.* (6th Cir. 1989) 881 F.2d 309, 313; see *O'Connor v. Consol. Coin Caterers* (1996) 517 U.S. 308, 312-313 [134 L.Ed.2d 433, 439].)

Plaintiff contends she presented sufficient evidence to establish a prima facie case of age discrimination and to rebut the Regents' assertion that she was rejected for the faculty position because she was not as qualified as the other candidates. The Regents contend the evidence does not present a prima facie case because the age difference between plaintiff and Dr. Vernau was not sufficient to create an inference of discrimination. Furthermore, the Regents argue, something more than age difference is required for an inference of age bias.

According to the Regents, "in order to meet the initial prima facie threshold, there must be some evidence in the record from which an inference could be drawn that the members of the search committee made their decision on the basis of Plaintiff's age." The Regents point out that there is no evidence of past discriminatory practices.

The Regents cite nothing to support the assertion that something more than age difference is required for a prima facie case. Where a point is raised in an appellate brief without argument or legal support, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.) As to the Regents' assertion that the age difference was not sufficient enough for an inference of discrimination, they cite several cases in which an age difference less than 10 years was deemed insufficient. (See *Grosjean v. First Energy Corp.* (6th Cir. 2003) 349 F.3d 332, 336, 338 [the plaintiff was 54 and the replacement was 51]; *Girten v. McRentals, Inc.* (8th Cir. 2003) 337 F.3d 979, 981 [the plaintiff was 62 and the replacement was 53]; *Dunaway v. Int'l Bhd. of Teamsters* (D.C. Cir. 2002) 310 F.3d 758, 767 [the plaintiff was five years away from retirement and the replacement was seven years younger]; *Lesch v. Crown Cork & Seal Co.* (7th Cir. 2002) 282 F.3d 467, 469, 472 [the plaintiff was 61 and the replacement was 53]; *Radue v. Kimberly-Clark Corp.* (7th Cir. 2000) 219 F.3d 612, 615, 619 [the plaintiff was 53 and the replacements were less than 10 years younger]; *Richter v. Hook-SupeRx* (7th Cir. 1998) 142 F.3d 1024,

1029 [the plaintiff was 52 and the replacement was 45].) However, in each of those cases, both the plaintiff and the individual who replaced the plaintiff were in the protected class, i.e., over 40 years old. Here, plaintiff was in the protected class but Dr. Vernau was not. Furthermore, and more importantly, the substantiality of the age difference is only material as it creates an inference that age was a factor in the employment decision. (*O'Connor v. Consol. Coin Caterers*, *supra*, 517 U.S. at pp. 312-313 [134 L.Ed.2d at p. 439].) The lower the ages in question, the greater the percentage difference between them and, hence, the stronger the inference that age was a factor.

At any rate, plaintiff need not rely on a prima facie case of discrimination to establish her claim. The *McDonnell Douglas* burden-shifting test applies only where the plaintiff is relying on circumstantial evidence of discrimination. Here, plaintiff has presented *direct* evidence of discrimination. "'"Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."'" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) "Where a plaintiff offers direct evidence of discrimination that is believed by the trier of fact, the defendant can avoid liability only by proving the plaintiff would have been subjected to the same employment decision without reference to the unlawful factor." (*Id.* at pp. 67-68.)

In her declaration, plaintiff stated that, on July 23, 1998, she inquired of Dr. MacLachlan, the head of PMI, about a

possible tenure track position. He responded, "'But Carol, we want to hire young people.'" MacLachlan also expressed his concern that the department was aging and that faculty members were all around the same age and he was worried they were going to get sick and disabled. In June 1998, Dr. Zinkl, a member of the search committee, told plaintiff that the department wanted to hire young people. Also in June 1998, Dr. Frederick Mohr, a member of the PMI faculty, told plaintiff there was a concern that the existing faculty was aging and new faculty members should be young.

In June 1999, during one of her interviews for the faculty position, Dr. Dennis Wilson, a PMI faculty member, told plaintiff that the department wanted to hire young people for the position. On August 11, 1999, after the selection of Dr. Vernau, Dr. Niels Pedersen, a Veterinary School professor, told plaintiff that the school was concerned about the age of the faculty and wanted to hire young people. Eleanor Yeatman, a laboratory technologist at VMTH until 1999, stated in her declaration that, during the last six months of her employment, she heard several remarks by faculty and staff that the department needed to hire young faculty to replace those getting close to retirement age.

With one exception, the other evidence cited by plaintiff to support her age discrimination claim is not accompanied by appropriate record citations and has not been considered. The exception is plaintiff's assertion that at a recruitment dinner in June 1999, Dr. Moore referred to her as a "'beautiful old

lady.'" However, this assertion misstates the record. At the recruitment dinner, plaintiff mentioned that she had recently been to Italy, where a waiter referred to her as "'bella senora.'" She indicated this meant "'beautiful lady.'" Dr. Moore interjected, "'No, it means beautiful old lady.'" Contrary to the inference plaintiff seeks to establish, Dr. Moore was not describing plaintiff as an old lady, but was correcting her translation of Italian.

The Regents contend the evidence on which plaintiff relies is not *direct* proof of discriminatory intent. According to the Regents, examples of direct evidence "would be testimony to the effect that search committee members said 'Dr. Mandell is too old for this job,' or 'We will no [*sic*] hire anyone over forty years old,' or 'She's way too close to being 50.'" The Regents characterize such statements as needing no further inference to find unlawful discrimination.

We fail to see any appreciable difference between a statement that the Regents will not hire anyone over 40 years old and one that says the Regents will only hire someone who is young. Although one statement specifies the exact break point for eligibility, the other nevertheless indicates clearly that age will be a factor, perhaps the overriding factor, in deciding whom to hire. A statement that the Regents were seeking someone young for the position or wanted to hire someone young needs no further inference to show that the Regents intended to discriminate on the basis of age. Although such evidence is not

determinative on the issue, it is certainly enough to withstand summary judgment.

The Regents argue that statements in the strategic plan that PMI is in an unhealthy condition due to the age of its faculty members "is not a statement of a policy to hire only professors below a certain age." Rather, "it is simply recognition of an 'unhealthy' imbalance in the core faculty between tenured and non-tenured professors." The Regents argue that statements by faculty members that PMI wanted to hire young people "are easily explained as reflective of their desire to recruit for the position at a more 'junior' level, meaning assistant professor because of the imbalance between full professors and the complete lack of junior professors in the Department." The Regents essentially equate a preference for young faculty members with a preference for nontenured, assistant professors.

The foregoing argument suggests that the Regents had a valid reason for favoring younger applicants, i.e., the fact that such applicants would not have tenure and would not be full professors. However, The Regents' defense in this matter, at least for purposes of their summary judgment motion, was not based on using age as a legitimate factor in the hiring decision. Instead, the Regents claimed that age was not a factor considered in the hiring decision, that plaintiff was rejected because she was less qualified than the other applicants.

The Regents next contend the various statements by faculty members regarding a desire to hire young people "are the very types of isolated stray remarks which have repeatedly been held insufficient to sustain a discrimination claim." The Regents cite *Gagne v. Northwest National Insurance Co.*, *supra*, 881 F.2d at page 314, where the court concluded a single statement by the plaintiff's immediate supervisor to the effect that he "'needed younger blood'" was insufficient to create an issue of fact to defeat summary judgment. However, in that case, the plaintiff had characterized the statement in her deposition as an "isolated remark" that was made "facetiously and was not directed at any particular individual." (*Ibid.*)

The Regents also rely on *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, where the plaintiff had sent a story to his supervisor by overnight mail and, consequently, it had not arrived until the next morning, after the supervisor had been questioned by others about the story. The supervisor complained about the delay to the plaintiff, saying "'[t]his is 1994, haven't you ever heard of a fax before?'" (*Id.* at p. 803.) The court characterized this statement as "highly ambiguous as far as discriminatory animus" and "at most a 'stray' ageist remark" "entitled to virtually no weight . . . ." (*Id.* at p. 809.)

Unlike the foregoing cases, the present matter does not involve either ambiguous or isolated statements. Multiple people directly involved in the hiring decision made statements that PMI was looking for somebody young to fill the faculty

position. These statements were also consistent with a strategic plan for the department. The statements were made directly to plaintiff in connection with her inquiries about a faculty position and her application for the position that ultimately went to a younger person. These were not stray, isolated statements. In our view, those statements were sufficient direct evidence of discriminatory animus to defeat summary judgment on plaintiff's age discrimination claim.

IV

Sex Discrimination

Absent direct evidence of discriminatory intent, plaintiff's initial burden under *McDonnell Douglas* was to present a prima facie case. (*Mixon v. Fair Employment & Housing Com.*, *supra*, 192 Cal.App.3d at p. 1317.) Plaintiff contends she satisfied this burden on her sex discrimination claim by presenting evidence that she is a woman, she was qualified for the faculty position, she was rejected for the position, and the position went to a male applicant.

The Regents contend a prima facie case of sex discrimination requires something more than the foregoing elements. According to the Regents, plaintiff must show "there were 'circumstances which give rise to an inference of unlawful discrimination.'" The Regents purport to quote from *Clark v. Claremont University Center*, *supra*, 6 Cal.App.4th at p. 663. However, the quoted language is not contained in the text of

that opinion. The Regents cite no other support for their argument.

The Regents argue that, recognizing a prima facie case based solely on the factors cited by plaintiff would mean that "any time a man is hired over a woman, a sex discrimination case would lie," which, the Regents argue, "is both inherently offensive and patently wrong." The Regents ignore the additional requirement that plaintiff was qualified for the position. It is only where a female applicant was qualified for the position but it went instead to a male that a prima facie case is established. Furthermore, the establishment of a prima facie case is only the starting point; it does not mean a sex discrimination claim has been proven. The employer need only articulate a legitimate reason for the employment decision to overcome the prima facie case.

In this instance, the reason given by the Regents for the decision to hire Dr. Vernau over plaintiff was that Dr. Vernau was better suited than plaintiff for the faculty position. Thus, to avoid summary judgment, plaintiff was required to "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

Plaintiff contends eight facts support an inference that sex bias played a role in the decision to hire Dr. Vernau instead of her: (1) PMI interviewed five candidates, Dr. Vernau, plaintiff, and three other women; (2) plaintiff was arguably the best qualified; (3) one faculty member stated that Dr. Vernau had been groomed for the position; (4) the four female applicants had their Ph.D. degrees; Dr. Vernau did not; (5) plaintiff had experience in writing and winning research grants; Dr. Vernau did not; (6) Dr. Vernau was given extra consideration and assistance in the interview process; (7) since the 1990's, the Veterinary School has hired 12 men and only three women; and (8) although 80 percent of the Veterinary School students are women, less than 25 percent of the "core" faculty are women.

Most of the foregoing facts either undercut plaintiff's claim or add nothing to it. For example, the fact that four out of five of the candidates selected to interview for the position were women (factor (1)) suggests that women were given more than a fair shake in the selection process. The fact that Dr. Vernau may have been groomed for the position (factor (3)) and was given extra consideration and assistance in the interview process (factor (6)) may suggest that Dr. Vernau was given preferential treatment. However, it does not support an inference that such preferential treatment was because of his sex.

A plaintiff may establish intentional discrimination "either directly by persuading the [jury] that a discriminatory

reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256 [67 L.Ed.2d 207, 217].) In doing so, the employee must prove not only that the employer's stated justification is a pretext but also that it is a pretext for discrimination. (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 507-508 [125 L.Ed.2d 407, 416].) While the plaintiff need not prove discrimination was the sole reason for the adverse treatment, he or she "must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment & Housing Com.*, *supra*, 192 Cal.App.3d at p. 1319.)

As to the fact that the four female applicants not chosen already had their Ph.D. degrees while Dr. Vernau was still working on his (factor (4)), this was at most one factor for the selection committee to consider. The job announcement for the position indicated that a Ph.D. degree was "preferred"; it did not say it was required. Furthermore, evidence was presented that the degree Dr. Vernau obtained in Canada was similar to a Ph.D. Where academic qualifications are concerned, courts should avoid interfering in professional appointments, which "necessarily involve 'subjective and scholarly judgments.'" (*Jiminez v. Mary Washington College* (4th Cir. 1995) 57 F.3d 369, 376.)

The fact that plaintiff had experience in writing and winning research grants, while Dr. Vernau did not (factor (5)), had little bearing on this matter as such ability was not mentioned in the job announcement for the position and plaintiff cites nothing to suggest this was a material feature of the job.

As for the makeup of the Veterinary School faculty and student body (factors (7) and (8)), plaintiff cites an interrogatory question that read: "With respect to each of the 20-25 core faculty positions Dean Osburn testified has been filled to date to replace the core faculty that the School of Veterinary Medicine lost through defendant's VERIP programs in the 1990's, please state the name, gender, and age at the time of offer of each applicant who was offered each position by the Dean's office." The Regents responded with a list that included 11 men, including Dr. Vernau, and three women. Plaintiff also cites the deposition testimony of Dean Osburn, who stated that, in recent years, 80 percent or more of the veterinary students at the University have been women, but that, as of November 2001, only 23 to 25 percent of the "core faculty" were women.

The foregoing evidence does not assist plaintiff. Dean Osburn's deposition was taken in November 2001. At the time, he indicated that, in the "old days" when he was a student, 100 percent of the student body was male. Approximately 15 years before the deposition, i.e., around 1986, a "major shift" took place in the student makeup. Prior to that time, the student body was running about 60 percent male and 40 percent female.

Thereafter, the student body was predominantly female. It was 80 percent female at the time of the deposition.

Evidence about the faculty makeup at a given time cannot be considered in a vacuum. It must be evaluated in light of the potential candidates for a faculty appointment. Given other evidence in the record that much of the "core faculty" at the Veterinary School was approaching retirement age, and assuming the Veterinary School is typical of other such schools throughout the Country in terms of historic student body makeup, it is not surprising that the core faculty would be predominantly male. At the time those faculty members were hired, there were probably few female candidates available. Even the fact that 11 of the last 14 faculty appointments have been males is not probative of anything without evidence of the makeup of those who applied and were qualified for appointment. According to Dean Osburn, the faculty at the Veterinary School had more female faculty members than any other veterinary school. Evidence that the student body had been running about 80 percent female the last several years while the faculty remained predominantly male does not demonstrate an imbalance in faculty appointments so much as it demonstrates a possible imbalance in the student body.

The last factor identified by plaintiff (factor (2)) was that she was the best qualified for the position. Plaintiff cites deposition testimony by Dr. Zinkl, a member of the search committee, and Dr. Tilahun Yilma, a faculty member. She also cites the declaration of Dr. Donald Strombeck, a former

professor at the University and a faculty member in the Veterinary College who served on more than 50 search or recruitment committees for various faculty positions.

Dr. Zinkl testified that, at the end of the second search committee meeting, plaintiff ranked in the group of "highly qualified." Dr. Yilma testified that plaintiff was highly qualified because of her Ph.D., her training, her curriculum vitae and her "reasonably good publication list." Dr. Yilma also testified that if Dr. Vernau was selected over plaintiff, then plaintiff was discriminated against. Dr. Strombeck opined that, based on his training and experience and his review of the curriculum vitae of the five candidates and other documents, plaintiff was the most qualified for the faculty position and Dr. Vernau was the least qualified.

The foregoing evidence proves at most a difference of opinion as to whether Dr. Vernau or plaintiff was the better choice for the faculty position. Dr. Zinkl stated only that he considered plaintiff highly qualified, not that he considered her more qualified than the other candidates. Although Dr. Yilma considered plaintiff more qualified, she was not a member of the search committee and, as it turned out, was the only one of 31 faculty members to vote against Dr. Vernau's appointment. She considered the search process to have been rigged in favor of Dr. Vernau even before plaintiff came on the scene. Dr. Yilma characterized the recruitment process as a "charade" like those she had witnessed in the past, where faculty members "recruit their own post docs." According to Dr. Yilma, "this

was an inside job to recruit their friend, their own graduate student, their country mate." However, Dr. Yilma admitted not looking at any of the letters of recommendation of the candidates, participating only in the interviews of Dr. Andrews and plaintiff and attending only Dr. Andrews' seminar. As for Dr. Strombeck, he was not involved in any of the interviews and viewed none of the seminars.

However, assuming plaintiff was more qualified for the faculty position than Dr. Vernau, this proves at most that the search committee and the others involved in the selection process either gave preferential treatment to Dr. Vernau or simply made a mistake in choosing him. However, there is nothing to suggest that this was done because of Dr. Vernau's sex. As explained previously, to establish a claim of discrimination, the employee must prove not only that the employer's stated justification is a pretext but also that it is a pretext for discrimination. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. at pp. 507-508 [125 L.Ed.2d at p. 416].) "It is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound. What the employee has brought is not an action for general unfairness but for [sex] discrimination." (*Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at p. 1005.) "'The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise,

shrewd, prudent, or competent. [Citations.] Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons." [Citations.]'" (*Ibid.*, quoting from *Fuentes v. Perskie* (3d Cir. 1994) 32 F.3d 759, 765, fn. omitted.) The evidence relied on by plaintiff is not sufficient for this purpose.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to vacate its order granting summary judgment and to enter a new order denying summary judgment but granting summary adjudication on all but plaintiff's age discrimination claim. The parties shall bear their own costs on appeal.

HULL, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.